

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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STOCK BUILDING SUPPLY LLC,

Plaintiff-Appellee,

v

FEDERAL DEPOSIT INSURANCE  
CORPORATION, formally known as AMTRUST  
BANK,

Defendant-Appellant,

and

HIGHFIELD LLC, JETT PUMP & VALVE LLC,  
J.O. GALLOUP CO, and THE DEPARTMENT OF  
LABOR & ECONOMIC GROWTH,

Defendants.

UNPUBLISHED  
September 16, 2010

No. 291136  
Genesee Circuit Court  
LC No. 08-088498-CH

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Before: GLEICHER, P.J., and ZAHRA and K. F. KELLY, JJ.

PER CURIAM.

Defendant-appellant appeals as of right a “judgment of foreclosure of construction lien.”  
We affirm.

**I. BASIC FACTS AND PROCEEDINGS**

Defendant-appellant Federal Deposit Insurance Corporation (FDIC) appeals as of right a “judgment of foreclosure of construction lien.” On appeal, FDIC challenges the circuit court’s order granting summary disposition to plaintiff-appellee Stock Building Supply LLC (Stock).

This instant case involves foreclosures on an 8-building condominium complex in Grand Blanc Township under the Construction Lien Act (CLA), MCL 570.1101 *et seq.* Defendant-

appellant FDIC is the receiver of AmTrust Bank, which was formerly known as Ohio Savings Bank. Ohio Savings Bank initially loaned \$4,650,000 to Grand Blanc I, LLC,<sup>1</sup> to develop the “Highfield Condominiums,” which were later named “Hunter’s Run Condominiums.” In return, Grand Blanc I, LLC granted Ohio Savings Bank a construction mortgage dated August 9, 2002 (hereafter first mortgage) on certain real property described in metes and bounds, “which shall be developed to contain Ninety-Six (96) single family residential condominium units . . . together with all buildings, structures, additions improvements, facilities, and other property . . . .” The first mortgage was not recorded until February 13, 2003.

The parties dispute when “improvements” had commenced on the condominium complex. Stock maintains demolition work as “improvements” had clearly begun in January 2003; FDIC maintains that “no physical construction had commenced before the recording of the [first] mortgage.” Stock supported its claim by presenting documentary evidence of “the demolition of numerous structures on the property and removal of fencing, concrete and other debris.” Stock also presented a letter dated January 7, 2003 indicating that a slated sales office had been inadvertently demolished. On the other hand, FDIC cites evidence that construction permits had not been issued until long after January 2003.

On June 8, 2005, Highfield, LLC, through Jeffrey and Rodney Walker, see *supra* at n 2, entered into an agreement in which Stock would supply labor and materials that would be used in the construction of the condominium complex. There is no dispute that Stock provided labor and materials for the construction of Buildings 1 and 8, which formed the basis for Stock’s eventual construction lien claims.

On December 29, 2006, Ohio Savings Bank loaned \$3,500,000 to Grand Blanc I, LLC (and other borrowers). In return, Grand Blanc I, LLC granted Ohio Savings Bank a mortgage (hereafter second mortgage) on units 13-96 of the condominium complex, which comprises only the units in Building 2-8. The second mortgage was recorded on February 9, 2007.

Though unclear from the lower court record, Stock, at some point before September 19, 2007, filed a construction lien against Building 1. On September 19, 2007, Stock filed a claim of lien against Building 8 for \$251,174.37, asserting that it had first provided labor or material on May 31, 2007 and last provided labor or material on August 30, 2007. On December 19, 2007, Stock filed an “amended claim of lien” against Building 8 for \$274,935.77, asserting that it had first provided labor or material on May 31, 2007 and last provided labor or material on October 2, 2007. On February 15, 2008, Stock filed a “second amended claim of lien” against Building 8 for \$300,697.27 asserting that it had first provided labor or material on May 31, 2007 and last provided labor or material on November 20, 2007.

Stock eventually filed a third party complaint in a Genesee County Circuit Court action, against Highfield, LLC, Grand Blanc I, and Rodney Walker to foreclose Building 1. The complaint named Ohio Savings Bank and asserted Stock’s construction lien against Building 1

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<sup>1</sup> Grand Blanc I, LLC is a subsidiary of Fountain Homes, which was owned and operated by Rodney Walker, his sons Jeffrey and Douglas, and financial officer, Scott Spandstra.

had priority over Ohio Savings Bank's construction mortgage. On March 18, 2008, a consent judgment was entered that stated, in part:

IT IS ORDERED that STOCK has a lien on the land and premises described on Exhibit "A" [identified as Building A] in the amount of TWO HUNDRED SEVENTY SIX THOUSAND TWO HUNDRED SEVENTY ONE and 72/100 (\$276,211.72) DOLLARS, together with the accruing time price differential from and after January 1, 2008, at the rate of 1.7% per month.

The order then provided for the sale of Building 1 at public auction to satisfy the judgment. The order further provided that:

IT IS FURTHER ORDERED that, in accordance with MCL 570.1119, the mortgage interest of OHIO SAVINGS BANK, recorded February 13, 2003, [the first mortgage] in Instrument number 200302130020664, Genesee County Records is subordinate to the interest of Stock."

Stock foreclosed its interest in Building 1, and the Sheriff's deed dated August 20, 2008 was duly recorded on September 3, 2008. After the court ordered 4-month redemption period, title vested in Stock, who sold Building 1.

On April 15, 2008, Stock commenced the instant action to foreclose a claim of lien against Building 8, again asserting that the claim of lien had priority over the mortgage interests held by Ohio Savings Bank, which had since become AmTrust Bank. AmTrust Bank, however, did not agree that Stock's claim of lien had priority. On February 25, 2009, Stock filed a motion for summary disposition. In addition to claiming its construction liens had higher priority, Stock also argued that it had foreclosed on Building 1, and because AmTrust Bank (then Ohio Savings Bank) failed to redeem Building 1, that the first mortgage was extinguished and that the second mortgage was subordinate to Stock's claim of lien.

After the circuit court conducted a hearing, the court granted Stock's motion. The court adjudicated Stock's claim of lien in the amount of \$368,779.55, "together with accruing time-price of 1.7% per month from and after January 1, 2009 until payment in full to Stock, plus costs differential and attorneys' fees in the amount of [\$9,724.78.]" The court further ordered that, in default of payment to Stock, Building 8 would be sold at public auction. The court also ordered the first mortgage "extinguished and discharged and a certified copy of this Judgment may be recorded discharging this mortgage." AmTrust Bank did not seek a stay of enforcement, and on June 24, 2009, Stock purchased Building 8 at a Sheriff's sale for the amount of its judgment. AmTrust Bank filed an appeal as of right in this Court, which was initially denied for lack of a final order, but reinstated following a motion for reconsideration. While this appeal was pending, this Court granted a motion allowing FDIC to replace AmTrust Bank as the proper party.

## II. STANDARD OF REVIEW

On appeal, a court's decision on a motion for summary disposition is reviewed de novo. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). A motion under MCR 2.116(C)(10) tests the factual support for a claim. When reviewing a motion under MCR

2.116(C)(10), a court must examine the documentary evidence presented and, draw all reasonable inferences in favor of the nonmoving party, and determine whether a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The nonmoving party has the burden of establishing through affidavits, depositions, admissions, or other documentary evidence that a genuine issue of disputed fact exists. *Id.* A question of fact exists when reasonable minds can differ on the conclusions to be drawn from the evidence. *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 398-399; 491 NW2d 208 (1992). Summary disposition is properly granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Maiden*, 461 Mich at 120.

### III. EXTINGUISHMENT OF THE FIRST MORTGAGE

FDIC argues that the circuit court erred in extinguishing the first construction mortgage in regard to Buildings 2-7 because Stock had not filed construction liens against those condominium units. Initially, we note there is no actual evidence presented that Buildings 2-7 exist, and thus we surmise that FDIC is merely asserting that the first mortgage was not extinguished in regard to the real property that would hypothetically house Buildings 2-7.

Stock sought summary disposition based on its claim that its construction liens on Building 8 had priority over the first mortgage and, alternately, that the first mortgage had been extinguished through the foreclosure of Building 1 and FDIC's failure to redeem. The consent order that allegedly extinguished the first mortgage specifically provided that:

IT IS FURTHER ORDERED that, in accordance with MCL 570.1119, the mortgage interest of OHIO SAVINGS BANK, recorded February 13, 2003, in Instrument number 200302130020664, Genesee County Records is subordinate to the interest of Stock."

It is well accepted that the foreclosure of a senior mortgage extinguishes the lien of a junior mortgagee where the junior mortgagee did not redeem at the foreclosure sale. *Advanta National Bank v McClarty*, 257 Mich App 113, 125; 667 NW2d 880 (2003), citing *Swarthout v Shields*, 185 Mich 427, 431, 152 NW 202 (1915). Here, the consent order provided that Stock's construction lien had priority over the first mortgage. Even though Stock's construction lien was only against Building 1, the consent order does not reference a portion of the real property in regard to the first mortgage, but "the mortgage interest." Therefore, FDIC's junior mortgage was extinguished after the four-month redemption period expired. *Advanta National Bank*, 257 Mich App at 125.

Further, FDIC has failed to provide any legal authority to bifurcate the first mortgage interests as to particular condominium units or buildings. As mentioned, the first mortgage is described in metes and bounds and this general description includes the real property "which shall be developed to contain Ninety-Six (96) single family residential condominium units . . . together with all buildings, structures, additions improvements, facilities, and other property . . . ." Unlike the second mortgage, which attempts to delineate FDIC's mortgage interests in terms of condominium units, the first construction mortgage simply covers the real property underlying the entire condominium complex. The first mortgage does not even mention where Buildings 2-7 would be built.

FIDC last argues that the CLA expressly limits the scope of Stock's construction liens. Specifically, MCL 570.1126(1) provides in part that,

A construction lien, concerning a condominium, arising under this act is subject to the following limitations:

(a) Except as otherwise provided in this section, a construction lien for an improvement furnished to a condominium unit or to a limited common element shall attach only to the condominium unit to which the improvement was furnished.

FDIC's reliance is misplaced. As earlier mentioned, there is no evidence that the condominium units in Buildings 2-7 exist to attach a construction lien. Further, the construction liens here only attached to Buildings 1 and 8. In other words, MCL 570.1126 only addresses the attachment of a construction lien, and does not address issues arising from the foreclosure process. Thus, the circuit court did not commit legal error in extinguishing the first mortgage.

### III. CONSTRUCTION LIEN OF BUILDING 8

FDIC argues there remains a question of fact in regard to whether there was an actual improvement to the property before February 13, 2003; the date the first mortgage was recorded.

MCL 570.1119(3), provides:

A construction lien arising under this act shall take priority over all other interests, liens, or encumbrances which may attach to the building, structure, or improvement, or upon the real property on which the building, structure, or improvement is erected when the other interests, liens, or encumbrances are recorded subsequent to the first actual physical improvement.

MCL 570.1103(1) provides:

"Actual physical improvement" means the actual physical change in, or alteration of, real property as a result of labor provided, pursuant to a contract, by a contractor, subcontractor, or laborer which is readily visible and of a kind that would alert a person upon reasonable inspection of the existence of an improvement. Actual physical improvement does not include that labor which is provided in preparation for that change or alteration, such as surveying, soil boring and testing, architectural or engineering planning, or the preparation of other plans or drawings of any kind or nature. Actual physical improvement does not include supplies delivered to or stored at the real property.

Although Stock did not provide labor or materials until 2007, this Court, in *M D Marinich, Inc v Michigan Nat'l Bank*, 193 Mich App 447; 484 NW2d 738 (1992), interpreted MCL 570.1119(3) and (4), and concluded that the plaintiff contractor's construction lien on a building project related back to the first actual physical improvements made on the project by an earlier contractor. Thus, the only question is whether there was actual physical improvement regardless of who performed it.

FDIC points to evidence that “[i]t was not until November 1, 2003, nine months [after the February 13, 2003 construction mortgage was recorded], that Genesee County granted a permit to the owner of [the condominium complex] to permit construction of a commercial approach.” Further, FDIC highlights that Grand Blanc Township did not grant a construction permit in regard to Building 8 until January 25, 2007.

However, Stock did not allege that construction began before February 13, 2003. Rather, Stock maintained that substantial demolition work had occurred as early as January 2003. Thus, FDIC’s construction permits are not relevant.

Although FDIC had initially questioned whether demolition work constituted an actual physical improvement,<sup>2</sup> FDIC now claims that Stock failed to present evidence of any demolition *in regard Building 8*. This claim lacks merit. As previously mentioned, the first mortgage relates to the entire real property underlying the condominium complex and does not in any way identify the specific site upon which Building 8 would be built. Thus, there need only be evidence that demolition work occurred on the property described in the mortgage. Further, Stock presented evidence of widespread improvement, including the demolition of several structures, fencing, and removal of concrete and debris, indicative of leveling. From this evidence, a sound inference can be drawn that there “actual physical change in, or alteration of, real property as a result of labor provided, . . . which is readily visible and of a kind that would alert a person upon reasonable inspection of the existence of an improvement.” MCL 570.1103(1). The circuit court did not err in granting Stock’s motion for summary disposition.

#### IV. PERFECTION OF CONSTRUCTION LIEN AGAINST BUILDING 8

FDIC argues that this Court cannot consider the initial claim of lien or the amended claim of lien because only the second amended claim of lien is referenced in the lower court pleadings. This argument was not presented to the trial court and is unpreserved. The appellate court need not address issues first raised on appeal. *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). Further, the amended claim of lien and the second claim of lien were attached to its response to Stock’s motion for summary disposition. FDIC’s claim is without merit.

FDIC next claims that Stock improperly extended the 90-day period to perfect a construction lien because the second amended claim of lien was not recorded “within 90 days

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<sup>2</sup> We consider FDIC claim that demolition work did not constitute an actual physical improvement abandoned. An appellant’s failure to properly address the merits of his assertion of error constitutes abandonment of the issue. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 626-627; 750 NW2d 228 (2008). In any event, though there are no published cases on whether demolition can constitute an actual physical improvement, one panel of this Court agreed that “extensive clearing and grubbing, including the cutting down of numerous trees, and . . . demolished homes on three of the parcels,” constituted an actual physical improvement. *E.T. Mackenzie Company v Long Investment Company, LTD.*, unpublished per curiam opinion of the Court of Appeals, issued June 26, 2007 (Docket No. 265811).

after the October 2, 2007, sworn last day of worked of the amended claim of lien or the sworn August 30, 2007, last day worked of the original claim of lien.”

MCL 570.1111(1), provides that:

Notwithstanding section 109, the right of a contractor, subcontractor, laborer, or supplier to a construction lien created by this act shall cease to exist unless, within 90 days after the lien claimant’s last furnishing of labor or material for the improvement, pursuant to the lien claimant’s contract, a claim of lien is recorded in the office of the register of deeds for each county where the real property to which the improvement was made is located. A claim of lien shall be valid only as to the real property described in the claim of lien and located within the county where the claim of lien has been recorded.

Stock initially filed a claim of lien against Building 8 for \$251,174.37 on September 19, 2007, asserting that it last provided labor or material on August 30, 2007. However, Stock later provided additional labor or material to Building 8. This additional labor or material could not be included under the initial claim of lien because it was provided 90 days after August 30, 2007. In an effort to preserve a claim of lien on the later provided labor or material, Stock filed a “amended claim of lien” and later a “second amended claim of lien,” each of which indicated a cumulative current balance of the labor or material provided by Stock.

FDIC claims that “Stock seeks to circumvent MCL 570.111(7) . . . by claiming that its second amended claim of lien covers the \$274,935.77, of work that was completed by October 2, 2007, as sworn to in the first amended lien, even though the second amended lien was not recorded within 90 days of October 2, 2007, as required by statute.” FDIC’s claim is disingenuous.

To have any merit, this Court must accept that Stock filed the initial claim of lien and merely “amended” it twice to include labor or material provided within 90 days August 30, 2007. We agree that Stock’s amended claim of lien and second amended claim of lien technically should have merely been filed as independent claims of lien and not referenced the cumulative amount of labor and material of all the claims of lien. However, we also agree with Stock that its “‘amended’ liens stand on their own.” The only defects of the amended claim of lien and second amended claim of lien is that they are identified as “amended” claims of lien and reference a cumulative amount of labor and materials that had been provided to Building 8. Otherwise, there is no dispute that the amended claim of lien and second amended claim of lien are valid.

The CLA contains a substantial compliance provision, MCL 570.1302(1), which provides:

This act is declared to be a remedial statute, and shall be liberally construed to secure the beneficial results, intents, and purposes of this act. Substantial compliance with the provisions of this act shall be sufficient for the validity of the construction liens provided for in this act, and to give jurisdiction to the court to enforce them.

In *Vugterveen Sys v Olde Millpond Corp*, 454 Mich 119, 121, 560 NW2d 43 (1997), the Michigan Supreme Court addressed the purpose of the CLA and determined that the act “was intended to protect the interests of contractors, workers, and suppliers through construction liens, while protecting owners from excessive costs.” *Id.* Further, the Court stated that the act should be “liberally construed to effectuate these purposes.” *Id.* Also, in particular to the instant issue, MCL 570.1111(2) states that “[a] claim of lien shall be in *substantially* the following form . . .” [Emphases added.]

Here, the only defects of the amended claim of lien and second amended claim of lien is that they are identified as “amended” claims of lien and reference a cumulative amount of labor and materials provided to Building 8. The only explanation offered from this deviation from the claim form is that Stock intended to facilitate proceedings by referencing previous liens and identifying the cumulative amount of labor and materials it provided. In other words, Stock was attempting to protect against excessive costs. Further, scrutinizing the amended claim of lien and second amended claim of lien in the manner suggested by FDIC does little to protect the interests of contractors, workers, and suppliers through construction liens. Accordingly, FDIC failed to show that Stock’s amended claim of lien and second amended claim of lien do not substantially comply with the CLA.

We affirm.

/s/ Elizabeth L. Gleicher

/s/ Brian K. Zahra

/s/ Kirsten Frank Kelly